IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.168 OF 1989

Sultan Salam Sab Arab ...Appellant

Versus

The State of Maharashtra ...Respondent

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Mr.Prakash Naik for Appellant.

Mr.V.B.Konde-Deshmukh, A.P.P. for Respondent.

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CORAM: A.M.KHANWILKAR, J.

NOVEMBER 22, 2005.

P.C.

1. Heard Mr.Naik for Appellant and Mr.Konde-Deshmukh, A.P.P. for Respondent State.

2. This appeal takes exception to the Judgement and order passed by the Additional Sessions Judge, Pune dated 24th February 1989 in Sessions Case No.320 of 1988 convicting the Appellant for offence punishable under Section 21 of the N.D.P.S. Act, 1985 and sentencing him to

suffer rigorous imprisonment for ten years and to pay a fine of Rs.1,00,000/- (Rupees One Lakh), in default, to suffer rigorous imprisonment for three months.

3. During the trial, the accused was in custody from 12th November 1987 to 25th November 1987. During the pendency of the present Appeal, the Appellant has been on bail.

4. The prosecution case is that on 12th November 1987, P.S.I. Temkar, who was attached to Vigilance Branch, Pune City, when he was at his office at around 6.15 p.m., received an information on telephone that a person by name Sultan Salam Sab Arab was dealing in brown sugar near Nagzari Canal on the rear side of the Sonmarg Talkies. After taking necessary steps, it was decided to conduct raid and to take search of the said person. The raiding party accordingly proceeded to the scene of offence. It is alleged that search was conducted on accosting the Appellant. During the seizure, according to the prosecution case, 1 gm 350 miligram of heroine valuing Rs.135/- was recovered

from the person of the Appellant accused.

5. I am not elaborating the other details, as the short question on which the present appeal is disposed of, is one of non-compliance of Section 50 of the Act. On reaching the scene of offence, according to the prosecution witnesses, the police informed the accused about the purpose of their visit and had asked him, if he was desirous to taking their search, which the accused declined. It is then stated that the police officer had asked the accused if his search was to be taken before the Magistrate or Gazetted Officer, even that offer was declined by him. Such evidence has been given by P.W.1 and panch witness P.W.2. The defence version, however, is that the accused was insisting that he should be searched before the Gazetted Officer or Magistrate but that request was not acceded to by the raiding party.

6. The short question that has been urged before me is that there is no evidence to corroborate the fact stated by the prosecution

witnesses for the first time in the course of evidence; neither the seizure panchnama or the complaint records the fact that the officer explained to the accused that he had a right to be searched before any Gazetted Officer or Magistrate and thereafter, offered him an option to exercise that right. For the first time, the prosecution witnesses have asserted in the deposition that the accused was asked whether he desired that he should be searched in the presence of a Magistrate or before any Gazetted Officer, which request was declined. P.W.1 in his examination-in-chief in paragraph 3 has stated thus:

> "I had asked the accused is he desired that his search should be taken in the presence of a Magistrate or any Gazetted Officer, but he declined."

. P.W.1 is the Investigating Officer. This witness was cross-examined and in paragraph 5 has deposed thus:

> "It is not true that the accused was insisting that his search should be taken in the presence of the Magistrate, but I had refused that request."

. In paragraph 6, he has deposed thus:

> "My complaint does not show that the accused was standing on the road. My complaint does not show that I had asked the accused if he desired that his search should be taken before the Magistrate or Gazetted Officer but he had declined. it is not true that I had not told the accused as to why he was arrested."

7. Similarly, P.W.2 a panch witness in his examination-in-chief has deposed thus:

> "The police officer had then asked the accused if his search was to be taken before a Magistrate. The accused declined to that."

and in his cross-examination has deposed thus:

> "It is not true that the accused was saying that he was innnocent and he was only residing in that zopadpatti and his search should be taken before a Magistrate. it is not true that the police had declined that request."

8. It is not in dispute that neither in the search panchnama nor in the compliant any reference is made to the fact that the accused was made aware of his right to be searched before the Gazetted Officer or Magistrate; nor there is mention in either the search panchnama or the complaint that

the accused was asked whether he desired to be searched in the presence of the Magistrate or any Gazetted Officer which offer he declined. This statement has come for the first time in the evidence recorded before the Court of P.W. 1 and P.W.2. As there is no corroboration of this fact, the evidentiary value of this assertion becomes doubtful. Even otherwise, even if the statement of P.W.1 and P.W.2 referred to above were to be accepted as it is, there is nothing to even remotely suggest that they had discharged the first obligation of making aware the accused about his right to be searched before the Magistrate or any Gazetted Officer. It is well settled that failure to comply with this obligation entails in infraction of right available to the accused under Section 50 of the Act. Accordingly, the search of the accused will have to be discarded, in which case, the prosecution case will fall to the ground. Viewed in this perspective, this appeal ought to succeed.

9. The Trial Court in the Judgment has dealt with this aspect in paragraph 12. It has observed

that infraction of Section 50 will arise only when the accused insists that he should be searched in the presence of a Gazetted Officer or the nearest Magistrate. The Trial Court has accepted the evidence of P.W.1 and P.W.2 as it is, without considering whether the statement made by P.W.1 and P.W.2 for the first time before the Court has been corroborated by the contents of search panchnama or the complaint, as the case may be. Accordingly, the Judgment of the Trial Court cannot be sustained.

10. Hence, this Appeal succeeds. The impugned order of conviction and sentence is set-aside. The Appellant is set at liberty. His bail bond to stand cancelled.

A.M.KHANWILKAR, J.